NO. 80169-0
COA NOS. 34331-2-II & 35662-7-II

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RANDY J. SUTHERBY,

Respondent.

In re the Personal Restraint of

RANDY J. SUTHERBY

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT SUTHERBY

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A. THE STATE IGNORES THE RECORD, AND SIMPLY SPECULATES THAT THERE MIGHT HAVE BEEN A TACTICAL REASON FOR FAILING TO MOVE FOR A SEVERANCE

The State simply asserts that the failure of Sutherby's trial attorney to move for a severance "was clearly a tactical decision." *Suppl. Br. Resp*, at 10. But as stated in *State v. Warren*, 55 Wn. App. 645, 654, 779 P.2d 1159 (1989), it is implausible to hypothesize that there must have been a tactical reason for not seeking a severance:

> [T]he State suggests that defense counsel may have decided not to seek severance for tactical reasons . . . Absent any evidence in the record to support this theory, however, we decline to speculate about defense counsel's tactical intentions.

In this case, speculation about hypothetical tactical reasons for not seeking a severance is even less appropriate, since the record contains an offer of proof of anticipated testimony from trial counsel as to the *absence* of any such tactical decision-making on his part. As set forth in appellate counsel's declaration, Sutherby's trial attorney has stated that he thinks he *should* have moved for a severance, and that he will *never* make the claim that he had a strategic reason for failing to make that motion.

> 4. I contacted Mr. Hatch and I asked him what he thought about the claims of ineffective assistance of counsel that I was raising. I sent him a copy of the brief of appellant that I filed. I wrote him a letter in which I asked him to contact me to talk about the ineffective assistance of counsel claims. A copy of that letter is attached to this declaration as Exhibit A.
>
> 5. Mr. Hatch responded to my letter by telephone. We had a very

brief telephone conversation. During that phone conversation, he told me that he had read Mr. Sutherby's opening brief on appeal, and he had read the argument that he was ineffective for having failed to move for a severance. ***He told me, "I should have moved for a severance." He did not assert, and said he could not recall having any strategic or tactical reason for failing to move for a severance.***

6. I also asked him what he thought about the claim that he was ineffective for failing to object to the mother's opinion testimony. He told me "It's a good point." When I asked him if he had any strategic or tactical reason for having failed to object to that testimony he said, "I don't."

7. I asked him if he would execute an affidavit stating these things that he had told me and he said that he was *not* willing to put his statements to me in writing.

8. I said to Mr. Hatch that I expected the prosecution might contact him to ask him about the claims of ineffective assistance of counsel. ***I asked him if he would tell the prosecution that he had strategic or tactical reasons for what he did. Mr. Hatch told me that I would never hear him claim that. "That will never happen," he told me.***

9. With respect to the IAC claim based on his failure to object to the mother's testimony, Mr. Hatch told me again, "It's a good point." ***With respect to the IAC claim based on his failure to move for a severance, he told me "that's a good point."***

10. Based upon my phone conversation with Mr. Hatch, it is my belief that if this Court were to order a reference hearing in this PRP proceeding and he were called to testify, Mr. Hatch would admit that he did not have any strategic or tactical reasons to justify his failures to move for a severance or to object to the mother's testimony.

Decl. Lobsenz, ¶¶ 4-10 (Appendix C to PRP) (bold italics added). The State simply ignores the fact that trial counsel has made these statements.

The State also fails to respond to the following opinion testimony

set forth in attorney Maybrown's affidavit, filed in support of the PRP:

> 12. First, in my opinion the failure of Mr. Sutherby's trial attorney to move for a severance of counts clearly constituted deficient conduct. The inclusion of ten charges of Possession of Depictions of Minors in the same trial during which charges of child rape and child molestation were also being considered by the jury, would make it extremely difficult – if not impossible -- for any defendant to win acquittal on the child rape and molestation charges. In any case where a child is claiming that an adult sexually molested her, additional evidence that the defendant was in possession of child pornography photos showing other children engaged in sexual activity would naturally be viewed by virtually any jury as evidence that tends to support the child's testimony that she was molested.
>
> 13. ***I cannot conceive of any possible strategic reason why a criminal defense attorney in this situation, representing a defendant charged with child molestation and rape, and also with several counts of possession of depictions of minors, would fail to move for a severance. There is no possible advantage to the defendant to be gained by having a joint trial on all these charges, and there is a very strong advantage to be gained by the defendant if a severance of the child depiction charges are severed and tried separately from the rape and molestation charges. Since there is nothing to be lost by seeking a severance, and much to be gained, the failure to move for a severance is obviously deficient conduct.*** No reasonably competent criminal defense attorney would fail to make such a motion. *See, e.g.,* Dawkins, 71 Wn. App. at 908-09 (affirming trial court's conclusion that trial attorney was ineffective in failing to bring lustful disposition motion simply because he believed the evidence would be admissible). Objectively, the failure of Sutherby's trial attorney to make such a motion clearly constitutes deficient conduct under the Strickland test.

Decl.Maybrown, ¶ ¶ 12-13 (Appendix B to PRP) (bold italics added).

Mr. Maybrown explained why a severance motion probably would have been granted had such a motion been made:

15. In deciding whether to grant a severance motion, a trial court is to consider the strength of the State's evidence on each count, the clarity of the defenses on each count, and the independent admissibility of the severed offenses if a severance is granted. Although I did not review all of the trial testimony, it does not appear that the State had a particularly strong case on the child rape and child molestation counts. This was certainly not a case where there was "overwhelming" evidence of guilt on these charges. The closing arguments indicate that the medical evidence failed to clearly establish that the child had actually been sexually molested. Nor was there any physical evidence that clearly established that there was any penetration.

16. As to the allegations of rape and molestation, the defense was a clear assertion that the defendant never penetrated the child with his finger, and that he never intended to touch the child for the purpose of sexual gratification.

17. Finally, it does not seem very likely that the trial court would have concluded that the child pornography offenses were independently admissible in a severed trial of the rape and molestation counts. On the contrary, such evidence should not have been allowed to prove that the defendant had a "lustful disposition." *See, e.g., State v. Ferguson*, 100 Wn.2d 131, 134, 667 P.2d 68 (1983); *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991).

18. I have read the State's appellate brief, and I recognize that the State is arguing that the photos pertinent to the child pornography counts would have been independently admissible under ER 404(b) to show intent and/or the absence of accident. This argument seems particularly weak to me for several reasons.

19. First, there is no intent element to Child Rape 1. It is a strict liability offense. *See, e.g., State v. Chhom,* 128 Wn.2d 739, 742-43, 911 P.2d 1014 (1996). Therefore, as to that offense, the whole question of intent and absence of mistake is completely irrelevant.

20. Second, while there is an intent element to Child Molestation (intent to achieve sexual gratification), I do not believe that the

trial judge would have concluded that the possession of photos of children engaged in sexual activity would be relevant and admissible under ER 404(b) to show the defendant's intent when he picked up the child and moved her while she was sleeping. The fact that a person might have viewed photos of naked adult women engaged in sexual activity on the Internet does not shed much light on whether that same person is telling the truth when he asserts that he accidentally touched an intimate part of some adult woman's body. Similarly, the fact that there was evidence indicating that Mr. Sutherby had intentionally sought out a website to view images of children engaged in sexual conduct does not shed much light on whether Mr. Sutherby accidentally put his hand on his granddaughter's private part when he moved her while she was sleeping. Moreover, under ER 403, the prejudicial effect of this inflammatory evidence significantly outweighed any probative value that it might have in the case.

21. The State's argument seems to be that the defendant's desire to visit websites that contained child pornography shows that he had a sexual attraction to small children and that in turn shows that he probably put his hand on the granddaughter's private part for a sexual purpose. But this reasoning actually runs counter to the *Ferguson* case law, which holds that unless the evidence in question shows a lustful disposition towards the particular allegedly "offended female," it is *not* admissible. In fact, the prosecutor argued in closing that the pornography evidence proved that the defendant had a *general* disposition to be lustfully attracted to children, and thus tended to show he was guilty of molesting his granddaughter LK, even though that precise argument is directly contrary to *Ferguson* and its progeny. The failure of defense counsel to recognize that this argument was improper, and his failure to object or move to strike under *Ferguson*, simply compounded his error in failing to move to sever.

22. Thus, in my opinion, ***it appears likely that the trial judge should have – and probably would have – granted a properly filed motion for a severance. If a severance had been sought and granted, this would, in my opinion, have greatly increased Mr. Sutherby's chances of being acquitted of child rape and child molestation.***

Decl. Maybrown, ¶ ¶ 15-22 (Appendix B to PRP) (bold italics added).

B. SUPPLEMENTAL ARGUMENT

1. EXPERT OPINION FROM EXPERIENCED CRIMINAL DEFENSE ATTORNEYS ON THE COMPETENCY OF TRIAL COUNSEL'S PERFORMANCE HAS ROUTINELY BEEN CONSIDERED BY WASHINGTON COURTS.

Rather than attempt to refute Mr. Maybrown's opinion, the State chooses instead to argue that his opinion is not admissible. The State ignores Washington case precedent where this Court and others have explicitly relied upon expert opinion regarding the competency of a criminal defense attorney's trial conduct. *See, e.g., In re Restraint of Brett*, 142 Wn.2d 868, 878-880, 16 P.3d 601 (2001) ("three legal experts . . . testified concerning the performance of Brett's trial counsel" and found it to be deficient); *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267 (1993) (Stowe "supported his motion with an affidavit of John C. Galbraith, an experienced criminal defense attorney"); *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989) (affidavit from very experienced criminal defense attorney" that said he could not "conceive of any reason, tactical or otherwise for not contacting witnesses . . .").

2. THE POSSIBILITY THAT ONE MIGHT LOSE A MOTION IS NOT A STRATEGIC REASON FOR NOT MAKING IT. UNLESS THE MOTION COULD DISADVANTAGE THE DEFENDANT, THERE IS NO REASON NOT TO MAKE IT.

Without giving any reasoning in support of it, the State merely

asserts that "it is unlikely that a motion for severance would have been granted by the Court." First of all, as set forth below respondent Sutherby sharply disputes this assessment. On the contrary it is very likely he would have won a severance motion had his trial attorney simply made the motion. But even if one were to assume for the sake of argument that there was a significant chance of losing the motion, that can never constitute a strategic reason for not making the motion.

If there is a reason to fear that the defendant will be *worse off* after making the motion than he was before, then there is a strategic or tactical reason for not making the motion. But the mere denial of a severance motion would not have placed Sutherby in a worse position than he was already in. A denial would merely have left him in the *same* position. And the position Sutherby was in, was a highly disadvantageous position where the danger was great that the jury would improperly infer from possession of sexual pictures of other children that Sutherby had a lustful and criminal disposition towards his granddaughter.

Washington has long recognized that the joining of unrelated charges for trial is particularly prejudicial when the joined offenses are sexual in nature. *See, e.g., State v. Ramirez*, 46 Wn. App. 223, 730 P.2d 98 (1987) (error to deny severance of two counts of indecent liberties because trial on multiple counts of sex offenses "creates strongly the

impression of a general propensity for pedophilia."); *State v. Harris*, 36 Wn. App. 747, 677 P.2d 202 (1984) (error to deny severance of two counts of first degree rape). *Not* making a severance motion simply made it a 100% certainty that defendant Sutherby would go to trial in the highly disadvantageous position of appearing to have a propensity to engage in criminal sexual acts. *See State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).[1] There is no strategic advantage to making no attempt to get out of this poor starting position.

3. THERE IS A REASONABLE PROBABILITY THAT A SEVERANCE WOULD HAVE BEEN GRANTED. THE TRIAL JUDGE HIMSELF SUGGESTED THAT A SEVERANCE WAS AN OPTION.

The State's suggestion that a severance motion would probably have been denied is preposterous. On the contrary, it is likely that the motion would have been granted. While a criminal defendant "need *not* show that counsel's deficient performance more likely than not altered the outcome in the case," *Strickland v. Washington*, 466 U.S. 668, 693 (1984), even if that were the proper standard, in this case Sutherby would meet it.

The dangers of a joint trial on several sex charges are that "the jury

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[1] "[A]n intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest. 'Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.'[Citation omitted]."

may use the evidence of one of the crimes to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged, or the jury may cumulate the evidence of various crimes charged and find guilt when, if considered separately, it would not so find." *State v. Standifer*, 48 Wn. App. 121, 126, 737 P.2d 1308 (1987).

In deciding whether such inherent prejudicial dangers are reduced by other factors, courts are instructed to consider the strength of the State's evidence on each count; whether the jury was given proper limiting instructions regarding the permitted use of the evidence of one criminal charge when considering another charge; and the admissibility of the other crimes evidence even if a severance had been sought and granted. In this case the prosecution's evidence on the Child Rape and Child Molestation charges was relatively weak. There was no clear medical evidence of sexual abuse. At best there was some redness (erythema) which one of the three doctors saw, but all of them agreed that there were many explanations for erythema which did not involve sexual abuse at all. The medical professionals agreed that a conclusion of sexual abuse could *not* be drawn from the physical medical evidence. While the trial judge did instruct the jury to consider each charge separately, there was no limiting instruction as to what use the jurors could make of the child pornography evidence when deciding the rape and molestation charges. They were

never told, for example, that they could only consider the pornography charges insofar as they shed light on the defendant's testimony that he might have accidentally touched L.K.'s private area. Moreover, the prosecutor undermined the instruction to consider the charges separately by contradicting it. He expressly urged the jury to consider the evidence of possession of child pornography as proof of the defendant's perverted sexual inclinations which in turn proved that he assaulted his granddaughter LK:

> You saw all, not all of it, but you saw a representative sample from the child pornography on that screen. ***We know that he is predisposed to touching children in a sexual manner.*** He has been fantasizing about it. . . . ***The pornography proves it. Is it normal for a person to look at this stuff? No. They have a predisposition to have sex with kids. It shows his motive; why he touched [L.K.]***

RP 11/3/05, at 297-98 (bold italics added).

In the present case, not only were all the dangers associated with the joint trial of unrelated sex offenses present, but we know for a fact that the trial judge independently saw that there were grounds for a severance because the trial judge himself suggested that severance of the child pornography charge was an option. At the time of the pretrial hearing of June 6, 2005, there were only two charges pending: one count of Child Molestation 1 and one count of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. The trial judge asked the

prosecutor at that hearing: "What about the possibility of separating those two counts?" RP 6/6/05, at 153. The prosecutor replied that he did not want to do that because he wanted to use the child pornography charge to bolster his case on the molestation charge.[2]

Given these circumstances, Sutherby has carried his burden of showing there is a reasonable probability that the trial judge would have granted a severance.

4. IN A NEARLY IDENTICAL CASE, THE MONTANA SUPREME COURT HELD THAT FAILURE TO MOVE FOR SEVERANCE OF CHILD PORNOGRAPHY CHARGES FROM THE TRIAL OF UNRELATED CHILD SEXUAL ABUSE CHARGES CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

In a nearly identical case the Montana Supreme Court held that trial counsel was ineffective for failing to file a competent motion for severance. In addition that Court held that the defendant's appellate counsel was also ineffective for failing to raise trial counsel's ineffectiveness on direct appeal.

In *Yecovenko v. State*, 340 Mont. 251, 173 P.3d 684 (2007) the defendant was charged with four criminal offenses. Like Sutherby, he was charged with committing a sexual assault upon a minor, and he was also

[2] He said: "I really don't want to do that. . . I have proof that this man was looking at little kids having sex on the internet for a long period of time and I think that's probative, not only of the separate criminal charge, but also of the sexual motivation. I think they're intertwined, they have to be tried together. RP 6/6/05, at 153.

charged with possessing child pornography images on his computer:

> In November 2000 Yecovenko was charged with two counts of sexual assault. These charges stemmed from allegations of sexual contact with the ten-year and twelve-year old daughters of his former live-in girlfriend. He was also charged with two counts of sexual abuse of children. These charges were unrelated to the assault charges and arose from the discovery by law enforcement of collected images of child pornography on Yecovenko's computer and on zip disks in his possession.

Yecovenko, 173 P.3d at 685, ¶ 3.

Yecovenko's trial attorney actually *did* make a motion for severance of the sexual assault and the child pornography charges. But his motion was facially inadequate because he failed to comply with the court rules. When the State pointed out the technical deficiencies in his written motion, the trial attorney failed to correct the deficiencies and the severance motion was denied. *Id.* Like Sutherby, Yecovenko was then tried and convicted of all charges:

> After listening to the testimony of the two children and after viewing the State's evidence of sexual abuse consisting of ten printed child pornographic images from the collection on Yecovenko's computer and disk, the jury convicted him on all counts of sexual abuse and sexual assault.

Yecovenko, 173 P.3d at 685, ¶ 4.

Yecovenko appealed and his appellate counsel raised the issue of whether the trial court erred in denying the motion to sever. The Montana Supreme Court affirmed the convictions on procedural grounds and did

not address the merits of the motion to sever issue. *Id.* Yecovenko's appellate counsel did not argue on appeal that trial counsel had been ineffective for failing to present a technically valid motion to sever. *Id.*

Finally, a third lawyer filed a petition for post-conviction relief for Yecovenko, and he raised claims of ineffectiveness on the part of both trial counsel and direct appeal counsel. The Montana Supreme Court agreed with Yecovenko that both of his previous lawyers had been ineffective. The Court ruled that the failure to make a technically proper severance motion was both deficient conduct and extremely prejudicial to Yecovenko insofar as defending against the sexual assault charges. As to deficient conduct the Court held as follows:

> Applying the *Strickland* test to trial counsel's performance, we conclude . . . that trial counsel ineffectively represented Yecovenko by proffering a motion to sever to the District Court that did not satisfy the threshold requirements for a pretrial motion. . . . [W]hen given a chance after the State pointed out the deficiencies of his motion to file a reply brief applying the necessary arguments, he did not do so. Trial counsel's failure to allege the nature or type of prejudice which would occur absent a severance did not constitute sound trial strategy or fall within a wide range of reasonable professional conduct – it constituted ineffective assistance.
>
> Similarly, appellate counsel's failure to raise ineffective assistance of trial counsel before this Court on appeal cannot be viewed as legitimate appellate strategy under these circumstances.

Yecovenko, 173 P.3d at 687-88, ¶¶ 19-20.

The Montana Supreme Court also ruled that the prejudice prong of the two-part *Strickland* test had been satisfied as well:

> The pornographic images shown to the jury as proof of the sexual abuse charges were, quite simply, horrific. . . These pictures had absolutely no probative value with respect to the sexual assault case, and would have been flatly inadmissible in that case had the matter been tried separately. But, they came into evidence in the combined trial. The jury was virtually certain to be disgusted with Yecovenko after viewing these images, which, while acceptable in the context of the sexual abuse trial, is unacceptable in connection with their obligation to dispassionately evaluate the evidence supporting the separate charges of sexual assault on minor children. As Yecovenko argued in his motion, his ability to challenge the credibility of the children's accounts in the sexual assault case was completely undermined by the introduction of the pornographic images to the jury.
>
> The second prong of *Strickland* requires the Court to assess whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. We conclude that Yecovenko has satisfied this prong, having shown that the prejudice to him "seriously undermined" the verdict. Our review of the record leads us to conclude that the failure to sever resulted in a level of prejudice, the absence of which could have reasonably resulted in a different outcome. Therefore we hold that the District Court erred in denying Yecovenko's petition for Post-Conviction Relief.

Yecovenko, 173 P.3d at 688, ¶¶ 22-23.

By way of comparison, Sutherby's ineffectiveness claim is obviously even more clearly meritorious than was Yecovenko's. At least Yecovenko's trial lawyer filed a motion for severance, even if it was

rejected on procedural grounds for failure to comply with state court rules. Sutherby's trial lawyer, however, never filed any severance motion at all.

Finally, the Montana Supreme Court granted exactly the same type of relief which Sutherby is requesting in this case. The Montana Court vacated Yecovenko's convictions on the sexual assault charges, because the evidence presented regarding the child pornography images on his computer made it impossible for Yecovenko to receive a fair trial on the child sexual assault charges. But the Montana Supreme Court did not vacate the convictions on the child pornography charges (called "sexual abuse" charges in Montana). Sutherby seeks exactly the same relief in the present case.[3]

5. THE PROSECUTION'S CONTENTION THAT EVIDENCE OF THE CHILD PORNOGRAPHY WOULD HAVE BEEN ADMISSIBLE ANYWAY AT A SEVERED TRIAL OF THE CHILD RAPE AND CHILD MOLESTATION CHARGES IGNORES CONTRARY CASE LAW.

The State argues that even if there had been a severance, it would not have changed the dynamics of the trial because evidence of the child pornography would have been admitted anyway to show that Sutherby did not accidentally touch L.K.'s vaginal area. This argument ignores the case law holding that evidence of sexual conduct with one person is *not*

[3] Although he seeks to have his possession of child pornography depictions consolidated into one count on double jeopardy, multiple punishment grounds, he has never sought to have child pornography convictions overturned because no severance motion was made.

admissible to show a motive to act sexually with a different person. Under the lustful disposition doctrine this Court has repeatedly held that evidence of collateral sexual misconduct may be admitted only when it shows the defendant has a lustful disposition towards the particular offended female. *State v. Ferguson*, 100 Wn.2d 131, 134, 667 P.2d 68 (1983); *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953); *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991).

Moreover, in this case the collateral sexual misconduct is even more remotely connected to the charged acts allegedly committed against L.K. Not only are different people involved, but *looking* at photos does not tend to show a predisposition to inappropriate *touching*. The prosecution conveniently ignores *State v. Medcalf*, 58 Wn. App. 817, 823, 795 P.2d 158 (1990) where the Court held that it was improper to admit evidence of the defendant possession of videotapes containing child pornography in a case where the defendant was on trial for raping an 11 year old child, since none of the photos were of the allegedly raped child.[4]

6. THE SEPARATE IDENTITY OF EACH CHILD IN EACH PHOTOGRAPH OF SEXUAL CONDUCT IS A FACT WHICH INCREASES THE MAXIMUM PUNISHMENT AND THUS MUST BE FOUND BY A JURY.

"Other than the fact of a prior conviction, any fact that increases

[4] "These video tapes have no connection with Gigi. The admission of Officer Emm's testimony about them was, therefore, improper."

the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) the Court clarified *Apprendi* by holding that the term "statutory maximum" means "the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant." *Blakely*, at 303.

The sentencing judge ruled that the proper "unit of prosecution: was one count for every different child that was depicted in a sexually explicit photograph. Over the defendant's objection, RP 12/21/05, at 2-3, at the sentencing hearing the judge, rather than the jury, proceeded to decide how many different children were depicted, and on this basis he determined that it was appropriate to convict the defendant of seven counts of Possession of Depictions. This caused the maximum punishment for Child Rape 1 authorized by the standard range to be much higher (240 to 318 months) than it would have been (93 to 123 months) had there been only one count of Possession of Depictions.

The prosecution erroneously contends that this case is governed by *In re Markel*, 154 Wn.2d 262, 111 P.3d 249 (2005) which held that the sentencing judge is permitted to make a "same criminal conduct" finding because that type of finding actually ***reduces*** the maximum sentence

which can be imposed. *Markel* notes that the general rule, which is commanded by statute, is that the judge calculates the standard range by counting each conviction separately. Thus each conviction contributes points to the offender score, and in that way increases the standard range and the maximum punishment authorized by law. Since every fact necessary for every conviction is found by the jury, this method of calculation of the maximum possible punishment does not offend the *Blakely* Sixth Amendment rule. When the judge proceeds to decide whether two or more convictions constitute the "same criminal conduct," the only possible effect such a finding can have on the range of authorized punishment is to decrease it: "Such a finding can operate only to decrease the otherwise applicable sentencing range." *Markel*, 154 Wn.2d at 274.

The same cannot be said in the present case. If the "unit of prosecution" is each individual child depicted in a photograph, then in order for the defendant to be convicted of seven counts, the jury must make seven separate factual determinations that there is a different child depicted in the photograph in question who was not depicted in any of the other photos which are the basis of the other counts. Each time such a determination is made, there is a basis for another conviction on another count, and the maximum possible sentence is *increased*. In the present case, the jury did not make any of these "separate child" determinations.

Accordingly, there can be only one constitutional conviction for this crime. The sentencing judge cannot increase the number of convictions and the resulting maximum punishment, by making a factual determination of how many separate children are depicted in the photos.

The prosecution suggests that there is some kind of "default rule" pursuant to which the Court must start with the assumption that the number of counts which the prosecution charged is the correct number. The State contends that "the prosecution will make a review of the investigation and a preliminary determination as to how many separate victims there appear to be." *State's Supplemental Brief, at 14-15.* Then the State suggests that "following the jury trial, if the defendant is convicted, then the trial court has the option of reducing the number of counts on the basis of its judicial determination that some of the photos comprising multiple counts actually depict the same child.

The flaw in this analysis is obvious. The jury can only return valid guilty verdicts on multiple counts if it is properly instructed that for each additional count that it finds the defendant guilty of, it must find that the prosecution has proved beyond a reasonable doubt that a new and different child is depicted. Sutherby's jury was not so instructed. Therefore, assuming the proper unit of prosecution is pegged to each separate child depicted, the jury did not make the finding necessary to support more than

one count. To allow the judge to make that determination is to allow the judge to decide the fact necessary for a conviction.

The prosecution pretends that the jury in this case necessarily decided that ten different children were depicted and that the judge then decided that was not supported by the evidence and reduced that determination to seven. In fact the jury never made any finding that more than 1 child was depicted, but at sentencing the judge decided that at least seven were depicted.

This is not like *Markel*. The judge did not reduce the maximum punishment authorized by the facts found by the jury. Instead, he supplied the missing factual determinations which the jury never made.

C. CONCLUSION

Respondent Sutherby asks this Court to vacate his convictions for child rape and molestation, to reduce the number of his child pornography possession conviction to one, and to remand for re-sentencing.

DATED this 9th day of May, 2008.

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